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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-211

LEWRON TELEVISION, INC.,
A BODY CORPORATE OF THE STATE OF MARYLAND,
Petitioner,

v.

UNITED NETWORK, INC., (FORMERLY CALLED JAYMAC, INC.), DEBTOR, INDIVIDUALLY AND AS GENERAL PARTNER OF UNITED NETWORK COMPANY, A LIMITED PARTNERSHIP, AND UNITED NETWORK COMPANY, A LIMITED PARTNERSHIP,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Table of Contents

	PAGE
Prayer for Writ	1
Citation to Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement of the Case	3
Reasons for Granting the Writ:	
1. There is a direct conflict between the Fourth and Second Circuits as to the application and construction of an important New York "security deposit" statute, which has not yet been judicially construed in any reported opinion	10
2. There is a conflict of opinion between the Fourth and Second Circuits as to the degree of New York contact required to render N. Y. Gen. Obligations Law, §7-101 (*McKinney*, 1962) applicable to a contract for the use or rental of personal property	12
Conclusion	13

Table of Citations

Cases

LewRon Television, Inc. v. D. H. Overmyer Leasing Company, Inc., 401 F.2d 689, cert. den. 393 U.S. 1083	1, 11
Mallory Associates v. Barving Realty Co., 300 N.Y. 297, 90 N.E.2d 468	12

Statutes

PAGE

N. Y. Gen. Obligations Law:
§7-101 (McKinney 1962) 2, 3, 5, 7, 10, 12, 13
§7-103 (McKinney 1962) 11, 12

CONTENTS OF APPENDIX

Opinion and Order of the United States Court of Appeals for the Second Circuit 15

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PRAYER FOR WRIT

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above titled case on 8 May 1972, which is in conflict with the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the case of *LewRon Television, Inc. v. D. H. Overmyer Leasing Company, Inc.* on 24 September 1968, 401 F.2d 689, cert. den. 393 U.S. 1083; a case involving the same facts and parties as the instant case, on the proper

construction and application of N.Y. Gen. Obligations Law, § 7-101 (*McKinney*, 1962), a vitally important "security deposit" statute which has not yet been judicially construed in any reported opinion.

CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is apparently unreported, as of 27 July 1972, and is printed at App. 15. The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 401 F.2d 689, cert. den. 393 U.S. 1083.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed was entered on 8 May 1972. The judgment of the United States Court of Appeals for the Fourth Circuit was entered on 24 September 1968. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254 (1).

QUESTIONS PRESENTED

1. Does the applicability of the N.Y. Gen. Obligations Law, § 7-101 (*McKinney*, 1962) depend upon the intent of the parties as to the nature of the payments involved in a contract for the use of personal property, as suggested by the Fourth Circuit, or does its applicability depend upon the mere fact that a refundable payment was made in connection with a contract for the use of personal property, as asserted by the Second Circuit?

2. The Fourth Circuit has suggested, by parity of reasoning to New York cases involving statutes similar to the N.Y. Gen. Obligations Law, § 7-101 (*McKinney*, 1962), that absent sufficient New York contact, a forum selection clause will not operate to invoke the public policy of New

York, as expressed by § 7-101 to govern a contract between two corporations foreign to the State of New York, to be performed in Nevada. The Second Circuit, however, has asserted that despite the resulting distortions of the agreement between the parties, the applicability of 7-101 may be dictated by a forum selection clause, notwithstanding the fact that the only significant New York contact was the execution of a single rider to the contract in New York.

STATUTE INVOLVED

N.Y. Gen. Obligations Law § 7-101 (*McKinney*, 1962):

§ 7-101. Money deposited or advanced for use or rental of personal property; waiver void

1. Whenever money shall be deposited or advanced on a contract for the use or rental of personal property as security for performance of the contract or to be applied to payments upon such contract when due, such money, with interest accruing thereon, if any, until repaid or so applied, shall continue to be the money of the person making such deposit or advance and shall be a trust fund in the possession of the person with whom such deposit or advance shall be made and shall be deposited in a bank or trust company and shall not be mingled with other funds or become an asset of such trustee.

2. Any provision of a contract whereby a person who has deposited or advanced money on a contract for the use or rental of personal property as security for the performance of the contract waives any provision of this section is absolutely void.

STATEMENT OF THE CASE

In the fall of 1966, D. H. Overmyer Leasing Company, Inc. ("Overmyer") was planning to set up a fourth national television network. The network's first regular

program was to be a two hour variety show emanating from Las Vegas and featuring entertainers appearing in that city's nightclubs. Overmyer arranged to rent the necessary color television cameras and related equipment from LewRon Television, Inc. ("LewRon"), and the parties entered into a written contract to that effect. The contract also provided for reimbursements of salaries and expenses for technicians which LewRon was to supply for operation and maintenance of the equipment. LewRon agreed to deliver the equipment to Las Vegas in time for the network's scheduled starting date. Overmyer agreed to pay a fee of $17,000 for each week of a thirteen week program cycle, amounting to a total contract price of $221,000. A deposit of $11,050 was paid to LewRon at the time the contract was signed and was to be applied to the last weekly payment when due. Overmyer had the right to delay the network's starting date for up to six months, provided it notified LewRon of its election prior to February 15; otherwise, the weekly payments were due on the dates set forth in the original agreement. If the network should fail completely to go on the air, Overmyer was obligated to LewRon for the total $221,000.

As the February 15 deadline approached, Overmyer realized that it would be unable to meet the scheduled starting date and began to have serious doubts as to the feasibility of the entire project. It entered into negotiations with United Network, Inc ("United") for a sale of the network concept and existing contract. United, however, was unwilling to risk as much as $221,000 on the possible failure of the network to go on the air. In order to facilitate the sale to United, Overmyer asked LewRon for alterations on the terms of its contract. Lengthy negotiations resulted in a rider significantly amending the original agreement.

According to the terms of the rider, Overmyer was given the right to terminate the contract upon seven days' notice, thus reducing its liability upon termination from the balance due on the remainder of the entire term, to payments made or due on the effective date of termination. As consideration of this significant concession and limitation of Overmyer's liability, LewRon was to receive payment of $60,000. The rider specified that said payment was the consideration for the rider, and that the rider would be null and void if such consideration were not paid.

Overmyer, however, pointed out that if the television unit were actually leased for thirteen weeks at $17,000 per week, as originally agreed, then under the terms of the new rider LewRon would receive not only the contract price $221,000 but also an additional $60,000 under the rider. Therefore, LewRon, in an effort to protect itself in case of termination but not to gain any greater benefit than originally agreed upon, agreed to credit the $60,000 to the final weekly payments in the event that the thirteen week term should be completed. Furthermore, as pointed out by the United States Court of Appeals for the Second Circuit in its opinion, neither party knew of the existence of the N.Y. Gen. Obligations Law § 7-101 (*McKinney*, 1962) at the time of the execution of the rider.

The rider, therefore, provided for a credit to Overmyer of $9,000 on the payment due during the tenth week of the thirteen week cycle, and credits of $17,000 for each of the payments due during the final three weeks of that cycle. It is evident that these credits were designed to equal the $60,000 consideration which Overmyer paid for the rider, thereby preventing the unjust enrichment of LewRon in the event that the thirteen week term was completed. The $11,050 deposit paid by Overmyer in October, 1966 was to be "retained by LewRon for its own account, unless this

agreement is extended for an additional thirteen week period, in which event said amount shall be credited against the $17,000 payment due for the first week of the second thirteen week period." Finally, the agreement specifically provided that "in no event shall LewRon be required to refund any payments theretofore made to LewRon."

Subsequent to the execution of the rider, Overmyer completed sale of the network to United and assigned all of its rights and obligations under the contract to United, without, however, relieving Overmyer from liability thereunder. The required $60,000 payment was made to LewRon by United. LewRon and United, thereafter, agreed to a month's delay in the network's starting date; the dates when the weekly payments would be due — and the credits upon those payments granted — were also changed accordingly. Additionally, United sought and received LewRon's assistance in assembling a technical staff to operate the facilities and agreed to the pay LewRon a ten per cent override on the salaries of this staff.

LewRon delivered its equipment and technicians to Las Vegas, and United began broadcasting the network show on May 1, 1967 and continued until June 2, 1967. Payments of $17,000 each were made to LewRon for the first three weeks of this period. Payments due May 22 and May 29 were not made. On the latter date, LewRon sent telegrams to United reiterating previous requests for payment according to the terms of the contract and stating: "Since we have had no response of any kind, our only alternative is to deny you use of our facilities effective immediately." Despite this message, United continued to use the facilities for three more days. On June 1, LewRon sent telegrams to United and Overmyer requesting confirmation as to whether they had, in fact, elected to terminate the contract in accordance with its provisions. The following day,

Overmyer replied that it was exercising the right of termination which it retained under its assignment agreement with United. This communication from Overmyer constituted the required seven days' notice, thus making the effective date of termination June 9.

In Spetember, 1967, LewRon filed suit in the Superior Court of Baltimore City against D. H. Overmyer Leasing Company, Inc. to collect amounts due under the agreement and rider thereto. After filing a general issue plea, Overmyer removed the action to the United States District Court for the District of Maryland on the basis of diversity of citizenship and controversy in excess of $10,000. Thereafter, both parties moved for summary judgment.

The United States District Court for the District of Maryland, Northrup, J., granted summary judgment for LewRon, in *LewRon v. Overmyer*, 43 FRD 5. Overmyer appealed this decision to the United States Court of Appeals for the Fourth Circuit, asserting for the first time on appeal, *inter alia*, that since the agreement provides that it shall be interpreted under the laws of the State of New York, when N.Y. Gen. Obligations Law, § 7-101 (*McKinney*, 1962), is considered, there is found, so the argument runs, a legal consideration which requires that summary judgment be awarded Overmyer. To summarize, that statute provides that money deposited or advanced on a contract for the use or rental of personal property to be applied upon such contract when due shall continue to be the money of the person making such deposit or advance "until repaid or so applied." The statute renders expressly void any contractual provision purporting to waive any portion of the statute. Overmyer concluded that if the $60,000 was security for or pre-payment of future rent payments, New York law required that it remain the property of Overmyer and be applied to its obligations.

The United States Court of Appeals for the Fourth Circuit reversed and remanded summary judgment granted in favor of LewRon, on the grounds that there existed a material issue of fact concerning the intent of the parties as to the nature of the various payments made under the contract in question. The Court further stated, at the end of its opinion, that the applicability of the N.Y. Gen. Obligations Law, § 7-101 (*McKinney*, 1962), would depend upon the intent of the parties as to the nature of any payments made pursuant to the agreement. The Fourth Circuit opinion further suggested, by parody of reasoning to New York cases involving statutes similar to Section 7-101 that absence was sufficient in New York contact, a forum selection clause will not operate to invoke the public policy of New York as expressed by Section 7-101 to control a contract between a Maryland and a Delaware corporation, to be performed in Nevada.

United then filed a petition for reorganization pursuant to Chapter XI of the Bankruptcy Act, 11 U.S.C. §501, *et seq.*, and LewRon filed a claim against United of $64,326.89. The claim consists of: (a) $51,000 for three weeks of rental payments (including the week ending June 9); and (b) $13,326.89 due LewRon for miscellaneous services rendered and expenses incurred pursuant to the various agreements between the parties (composed primarily of overtime and living expenses for technical supervisors and the 10% override on salaries of the technical staff).

United denied owing anything other than two weeks' rental to LewRon and also filed a counterclaim for $71,050 against LewRon. The counterclaim was based on Section 7-101 of the New York General Obligations Law which pro-

vides that deposits and advance payments on rentals of personal property are to remain money of the party making such payment and must be held in trust for him by the party to whom it is paid and not commingled with other funds until such time as it is actually applied as payments or returned. United contended that the $11,050 and $60,000 payments due LewRon come within the provisions of Section 7-101, that LewRon, consequently, became trustee for such funds, that those funds were commingled in violation of the statute, and that LewRon was statutorily forbidden to retain them under provisions of the contract allowing it to do so.

After hearing extensive testimony pertaining to both the claim and counterclaim, the bankruptcy referee made findings of fact and conclusions of law disallowing all of LewRon's claim except for the two weeks' rental admittedly unpaid and due, and sustaining United's counterclaim. The referee concluded that the contract was terminated by LewRon on May 29, rather than by Overmyer's telegram of June 2, that the seven days' advance notice provision did not, therefore, come into play, and that no rent was due for the week ending June 9. He grounded his disallowance of the $13,326.89 in miscellaneous claims on a ruling that sufficient proof had not been presented with regard to United's failure to pay charges for the expenses incurred and services rendered. The referee also ruled that LewRon's approved claim of $33,593.34 could be used as a set-off against the trust funds due United, and issued judgment in favor of United in the sum of $37,456.66. Furthermore, LewRon was prevented from pursuing its remedy against Overmeyer in the United States District Court for Maryland due to the exclusive jurisdiction assumed by the Referee and on one occasion the Referee held a hearing to determine whether LewRon's

counsel should be held in contempt of court for attending a pre-trial conference ordered by the District Judge in Maryland.

Upon review by the District Court, the referee's order was affirmed with a modification eliminating use of LewRon's approved claim as a set-off.

LewRon then took an appeal from the judgment of the U. S. District Court for the Southern District of New York to the U. S. Court of Appeals for the Second Circuit on the grounds that the District Court erred in upholding the application by the Referee in Bankruptcy of Section 7-101, to the agreement in question. The Court of Appeals for the Second Circuit held that the intent of the parties as to the nature of the payments made pursuant to the agreement was irrelevant in determining the application of Section 7-101. By thus applying the public policy of the State of New York as expressed by Section 7-101 to a contract between a Maryland and a Delaware corporation to be performed in Nevada, the Court of Appeals for the Second Circuit held, in essence, that the applicability of Section 7-101 may be dictated by a forum selection clause notwithstanding the fact that the only significant New York contract was the execution of a single rider to the agreement in the State of New York.

REASONS FOR GRANTING THE WRIT

1. THERE IS A DIRECT CONFLICT BETWEEN THE FOURTH AND SECOND CIRCUITS AS TO THE APPLICATION AND CONSTRUCTION OF AN IMPORTANT NEW YORK "SECURITY DEPOSIT" STATUTE, WHICH HAS NOT YET BEEN JUDICIALLY CONSTRUED IN ANY REPORTED OPINION.

N.Y. Gen. Obligations Law, § 7-101 (*McKinney's* 1962); is a statute, currently in force as of the date of this petition, which governs the treatment of advanced payments and se-

curity deposits on contracts for the use or rental of personal property. In addition, as of the date of this petition, Section 7-101 has not been judicially construed in any reported opinion, other than the opinions of the Fourth and Second Circuits Courts of Appeals referred to herein.

The importance of this statute lies both in the fact that it governs all leases of personal property in the State of New York and in that it is the companion statute to the more extensively litigated Section 7-103, which governs money deposited or advanced for the use or rental of real property. Its companion status to Section 7-103 present the real possibility that any construction of Section 7-101 may be applied by parody of reasoning to questions concerning Section 7-103.

The Fourth Circuit in *LewRon v. Overmyer*, 401 F.2d 689, *cert. den.* 393 U.S. 1083; suggested that the application of Section 7-101 "may depend in part on the intentions of the parties as to the purpose of the payment." In support of this statement, the Court emphasized, in a footnote, that the parties did not intend the $60,000 payment to constitute the type of payment to which Section 7-101 applies. The Court thereby implied that to allow a party to assert Section 7-101 to its advantage at such a late date was to distort the intent of the parties. If such a result were allowable, then Section 7-101 would be applicable in spite of any contrary intent, but since the Court suggested that such a result was not proper, it follows that in the opinion of the Fourth Circuit, the intent of the parties governs the application of Section 7-101.

The Second Circuit, however, *In the Matter of United Network*, involving the assignee of the same contract before the Fourth Circuit, and on the same facts as *LewRon v. Overmyer, supra*, held that the intent of the parties

to an agreement for the rental of real property had nothing to do with the applicability of Section 7-101 regardless of the resulting distortion of the intent of the parties. The only factor which the Second Circuit seemed to take into account is that a sum of money could be characterized as deposited or advanced for the use or rental of personal property, and that factor obviated any inquiry into the intent of the parties.

This conflict between the Circuits can only serve to create confusion in the minds of any parties contracting for the use of personal or real property in, or connected with, the State of New York, and justifies the grant of *certiorari* to review the judgments below.

2. THERE IS A CONFLICT OF OPINION BETWEEN THE FOURTH AND SECOND CIRCUITS AS TO THE DEGREE OF NEW YORK CONTACT REQUIRED TO RENDER N.Y. GEN. OBLIGATIONS LAW, § 7-101 (*McKINNEY*, 1962) APPLICABLE TO A CONTRACT FOR THE USE OR RENTAL OF PERSONAL PROPERTY.

The Court of Appeals for the Fourth Circuit, in *LewRon v. Overmyer*, 401 F.2d 689, 694, cert. den., 393 U.S. 1083, on the same facts as the instant case, recognized that the agreement in question involved two parties which were corporations foreign to the State of New York and was to be performed in the State of Nevada. In light of these facts, the Court of Appeals for the Fourth Circuit suggested that *Mallory Associates v. Barving Realty Co.*, 300 N.Y. 297, 90 N.E.2d 468, 15 A.L.R.2d 1193 (1949), might be applicable. In *Mallory Associates, supra*, the New York Court of Appeals held that N.Y. Gen. Obligations Law, § 7-103 (*McKinney*, 1962) was applicable to leases of real property located outside of the State of New York where there were significant New York contacts. The Fourth Circuit therefore suggested that the Mallory case implies that "absent significant New York contacts the

New York Personal property statute (Section 7-101) may be inapplicable." The Court of Appeals for the Fourth Circuit recognized that this contract contained a forum selection clause but suggested that though "the contract provides that it shall be interpreted by the laws of the State of New York. . . . [p]resumably, this means all of the law of New York, including New York's choice-of-law rules."

The Second Circuit Court of Appeals, *In the Matter of United Network*, apparently found the forum selection clause contained in the original agreement, combined with the fact that only one of the various riders to that agreement was executed in New York, as sufficient New York contact for the application of Section 7-101. The result of this conflict of opinion between the two circuits and between the Second Circuit and the New York Court of Appeals in *Mallory Associates*, *supra*, can serve only to cloud in complete confusion any agreement for the use or rental of personal or real property which is any way connected with the State of New York, as to the applicability of Section 7-101 or Section 7-103 to any such agreement.

This conflict further justifies the grant of *certiorari* to review the judgment below.

CONCLUSION

For these reasons we pray that the petition be granted and that a writ of certiorari be directed to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

EDWARD L. BLANTON, JR.,
Counsel for Petitioner.

APPENDIX

Opinion and Order of United States Court of Appeals For the Second Circuit

(Filed May 8, 1972)

No. 532 — September Term, 1971.

(Argued March 1, 1972 Decided May 8, 1972.)

Docket No. 71-1861

IN THE MATTER OF UNITED NETWORK, INC. (formerly called Jaymac, Inc.), Debtor, Individually and as General Partner of United Network Company, a limited partnership, and United Network Company, a limited partnership,

Debtor.

Before:

MURRAH,* KAUFMAN and OAKES,

Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, at New York City, Charles H. Metzner, *Judge.*

Affirmed as modified.

MURRAH, *Circuit Judge:*

The claim and counterclaim in this Chapter XI reorganization proceeding arise out of a complicated contract between the debtor corporation and one of its creditors. The

* Senior Judge of the Tenth Circuit Court of Appeals, sitting by designation.

case ultimately turns on the interpretation of this contract and the applicability of §7-101 of the New York General Obligations Law. Both the bankruptcy referee and the District Court gave controlling effect to the statute and granted judgment for the debtor corporation on the counterclaim. We affirm that judgment and modify judgment on the creditor's approved claim to allow items to be noted.

In the fall of 1966, D. H. Overmyer Leasing Co., Inc. (Overmyer), was planning to set up a fourth national television network. The network's first regular program was to be a two-story variety show emanating from Las Vegas and featuring entertainers appearing in that city's night clubs. Overmyer arranged to rent the necessary color television cameras and related equipment from LewRon Television, Inc. (LewRon), and the parties entered into a written contract to that effect. The contract also provided for the reimbursement of salaries and expenses for technicians which LewRon was to supply for operation and maintenance of the equipment. LewRon agreed to deliver the equipment to Las Vegas in time for the network's scheduled starting date. Overmyer agreed to pay a rental fee of $17,000 for each week of a thirteen-week program cycle, amounting to a total contract price of $221,000. A deposit of $11,050 was paid to LewRon at the time the contract was signed and was to be applied to the last weekly rent payment when due. Overmyer had the right to delay the network's starting date for up to six months provided it notified LewRon of its election prior to February 15; otherwise, the weekly rental payments were due on the dates set forth in the original agreement. If the network should fail completely to go on the air, Overmyer was obligated to LewRon for the total $221,000, subject, of course, to any payments which LewRon might receive from renting the equipment to another party.

As the February 15 deadline approached, Overmyer realized that it would be unable to meet the scheduled starting date and began to have serious doubts as to the feasibility of the entire project. It entered into negotiations with United Network, Inc. (United) for a sale of the network concept and existing contracts. United, however, was unwilling to risk as much as $221,000 on the possible failure of the network to go on the air. In order to facilitate the sale to United, Overmyer asked LewRon for alterations on the terms of their contract. Lengthy negotiations resulted in a rider significantly amending the original agreement.

According to the terms of the rider, Overmyer was given the right to terminate the contract upon seven day's notice, and its liability was limited to payments made or due on the effective date of termination. The rider was to become effective upon Overmyer's payment of $60,000 to LewRon, "said payment being the consideration for this rider." The rider also provided for a credit to Overmyer of $9,000 on the rental payment due during the tenth week of the thirteen-week cycle, and credits of $17,000 for each of the payments due during the final three weeks of that cycle. It is evident that these credits were designed to equal the $60,000 consideration which Overmyer became obligated to pay for the rider. The $11,050 deposit made by Overmyer in October, 1966, was to be "retained by LewRon for its own account unless this agreement is extended for an additional 13 week period, in which event said amount shall be credited against the $17,000 payment due for the first week of the second 13 week period." Finally, the agreement specifically provided that "in no event shall LewRon be required to refund any payments theretofore made to LewRon."

Subsequent to execution of the rider, Overmyer completed sale of the network to United and assigned all of its rights

and obligations under the contract to United. The required $60,000 payment was made to LewRon by United. LewRon and United, thereafter, agreed to a month's delay in the network's starting date; the dates when the weekly rental payments would be due — and the credits upon those payments granted — were also changed accordingly. Additionally, United sought and received LewRon's assistance in assembling a technical staff to operate the facilities and agreed to pay LewRon a 10% override on the salaries of this staff.

LewRon delivered its equipment and technicians to Las Vegas and United began broadcasting the network show on May 1, 1967, and continued until June 2, 1967. Rental payments of $17,000 each were made to LewRon for the first three weeks of this period. Payments due May 22 and May 29 were not made. On the latter date LewRon sent telegrams to United reiterating previous requests for payment according to terms of the contract and stating: "Since we have had no response of any kind our only alternative is to deny you use of our facilities effective immediately." Despite this message, United continued to use the facilities for three more days. On June 1, LewRon sent telegrams to United and Overmyer requesting confirmation as to whether they had, in fact, elected to terminate the contract in accordance with its provisions. The following day Overmyer replied that it was exercising the right of termination which it retained under its assignment agreement with United. LewRon views this communication from Overmyer as the required seven days' advance notice, thus making the effective date of termination June 9.

United subsequently filed its petition for reorganization pursuant to Chapter VI of the Bankruptcy Act, 11 U.S.C. §501, *et seq.*, and LewRon filed a claim against United of $64,326.89. The claim consists of: (a) $51,000 for three

weeks of rental payments (including the week ending June 9); and (b) $13,326.89 due LewRon for miscellaneous services rendered and expenses incurred pursuant to the various agreements between the parties (composed primarily of overtime and living expenses for technical supervisors and the 10% override on salaries of the technical staff).

United denied owing anything other than two weeks' rental to LewRon and also filed a counterclaim for $71,050 against LewRon. The counterclaim was based on §7-101 of the New York General Obligations Law[1] which provides that deposits and advance payments on rentals of personal property are to remain money of the party making such payment and must be held in trust for him by the party to whom it is paid and not commingled with other funds until such time as it is actually applied as payments or returned. United contends that the $11,050 and $60,000 payments due LewRon come within the provisions of §7-101, that LewRon, consequently, became trustee for such funds, that those funds were commingled in violation of the stat-

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[1] The contract expressly stated that it was to be "interpreted under the laws of the State of New York."

The New York General Obligations Law §7-101 provides:

"1. Whenever money shall be deposited or advanced on a contract for the use or rental of personal property as security for performance of the contract or to be applied to payments upon such contract when due, such money, with interest accruing thereon, if any, until repaid or so applied, shall continue to be the money of the person making such deposit or advance and shall be a trust fund in the possession of the person with whom such deposit or advance shall be made and shall be deposited in a bank or trust company and shall not be mingled with other funds or become an asset of such trustee.

"2. Any provision of a contract whereby a person who has deposited or advanced money on a contract for the use or rental of personal property as security for the performance of the contract waives any provision of this section is absolutely void."

ute, and that LewRon was statutorily forbidden to retain them under provisions of the contract allowing it to do so.

After hearing extensive testimony pertaining to both the claim and counterclaim, the bankruptcy referee made finding of fact and conclusions of law disallowing all of LewRon's claim except for the two week's rental admittedly unpaid and due, and sustaining United's counterclaim. The referee concluded that the contract was terminated by LewRon on May 29, rather than by Overmyer's telegram of June 2, that the seven days' advance notice provision did not, therefore, come into play, and that no rent was due for the week ending June 9. He grounded his disallowance of the $13,326.89 in miscellaneous claims on a ruling that sufficient proof had not been presented with regard to United's failure to pay charges for the expenses incurred and services rendered. The referee also ruled that LewRon's approved claim of $33,593.34[2] could be used as a set-off against the trust funds due United, and issued judgment in favor of United in the sum of $37,456.66.

Upon review by the District Court, the referee's order was affirmed with a modification eliminating use of LewRon's approved claim as a set-off.[3]

United's Counterclaim

Notwithstanding the rather involved factual background of this case, the primary issue, as we have seen, is simply whether the $11,050 and $60,000 payments to LewRon were in the nature of either security deposits or advance pay-

[2] This sum consists of the two weeks' rental payments of $17,000 each, or $34,000 in the aggregate, less a small offset of $406.66, covering a credit which LewRon was found to owe United.

[3] The District Court concluded that §68 of the Bankruptcy Act, 11 U.S.C. §108, does not authorize the set-off of debts against funds which are held in trust, such as the $71,050 involved here. LewRon does not appeal the District Court's decision on this point.

ments on a contract for the use or rental of personal property so as to bring them within the provisions of §7-101 of the New York General Obligations Law. If the payments come within the statute's intended coverage it is clear that the trust funds were converted in violation of the statute since they were admittedly commingled with LewRon's regular checking accounts.

For the first time on appeal LewRon asserts that this contract is primarily one for services rather than for the use or rental of personal property; hence, it is not within the purview of §7-101. While a contract in which the supply of services was a substantial element might very well not come within the coverage of §7-101, we think the record clearly indicates that the services provided for in this agreement were merely incidental to its equipment rental aspect. Although some minor services were performed — primarily those of the two supervisory technicians — the contract's foremost concern was with the use of television equipment costing approximately $1,250,000, and the bulk of the $17,000 payments was for the purpose of obtaining such use.

The more difficult question, of course, is whether the funds in question were paid to LewRon as security deposits or advance rental payments on the contract. The answer is, perhaps, clearer with regard to the $11,050 payment since it is specifically denominated a "deposit" in the original contract. The terms of the rider make no significant change in the character of this payment, but only provide for LewRon's right to retention of it unless the contract should be extended for a second thirteen-week cycle, in which case it was to be credited against a future rental installment. The $11,050 payment, therefore, clearly falls within the coverage of §7-101, since the contract expressly refers to it as both a deposit and an advance on a future rental installment.

Although the language of the rider is not quite so specific with regard to the $60,000 payment, there can be no doubt that it, too, is an advance to be applied to future rents due. After requiring payment of the $60,000 as consideration, the rider provides for credits totaling $60,000 to be extended to the last four rental installments due under the contract. To say that the $60,000 was not within the coverage of §7-101 because the rider failed to specifically so state, would unduly emphasize form over the substance of the contractual language. LewRon urges that *34 W. 34th St. Corp. v. Nehama Realty Corp.*, 153 N.Y.S.2d 427 (Sup. Ct. N.Y. Co. 1956), and *In re Dilbert's Leasing & Development Corp.*, 345 F.2d 172 (2d Cir. 1965), compel this result; but we cannot agree. The agreement in the *34 W. 34th St.* case is certainly distinguishable from the present one, inasmuch as it did not in any way provide for the payment in question to be applied as credits on particular rental payments otherwise due. The language of *In re Dilbert's* is not persuasive on the issue here, simply because §7-101 was not invoked or relied upon by the parties in that case.

We must also disagree with LewRon's arguments that other provisions of the rider overcome any references to or representations of these funds as security deposits or advance payments. Invoking language of the rider, LewRon says that the $60,000 payment is "consideration for this rider" and, as such, could not be a security deposit or advance payment which would have to be held in trust. By entering into the rider LewRon, unquestionably, gave up substantial benefits which had accrued under the original contract, and the $60,000 was paid in consideration of its relinquishment of those benefits. The rider did not stop at describing the $60,000 payment as consideration, however, but went on to provide for its application to future

rental installments. There is nothing to prevent a consideration being paid in the form of a deposit or advance on future liabilities so as to come under §7-101, and it is clear to us that this is precisely what the parties intended and what the rider provided for in this case.

LewRon also contends that the funds cannot be viewed as advance rental payments within the statute's coverage because their application to future liabilities was subject to the occurrence of a condition precedent; *i.e.*, that the lease not be terminated prior to the dates designated for such application of the funds. But the fact that the funds were not to be "applied" until occurrence of a condition precedent does not affect their status as advance payments. Any advance payment is, by its very nature, in some respects subject to a condition precedent—usually the maturing of an anticipated obligation. The manifest purpose of §7-101 is to require that such funds be held in trust during the interim between the initial payment and their actual application to liabilities. If the funds could be commingled until occurrence of the condition procedent calling for their application, this statutory purpose would be subverted.

Nor can the contract's statement that "in no event shall LewRon be required to refund any payments theretofore made to LewRon," be given the effect of removing the $71,050 fund from the statute's coverage; especially since §7-101(2) voids any attempt to waive the statute's provisions. The parties' intentions concerning disposition of the funds in the event the contract was terminated are irrelevant to the issue before us. What is relevant is that if the contract had run its full course the funds were to be applied as advance payments, and the statute requires that as advance payments they were to be held in trust in a segregated account. United claims these funds under the statute — not under the contract. By commingling the

$71,050, LewRon converted trust funds to its own use in violation of the statute and is obligated to repay them to United, regardless of any contractual language to the contrary.

Finding the contract to be clear and unambiguous in its treatment of these funds as deposits or advance payments, we need not resort to the parol evidence elicited in testimony before the referee. Suffice it to say that a review of that testimony merely substantiates what we find to be clear on the face of the contract. It is enough that the parties treated the $71,050 as advance rental payments on their account books and in their business dealings with others. Inasmuch as neither party had a full awareness of the provisions of §7-101 during the life of the contract, such treatment must be viewed as free of any ulterior motivation and as a valid indication of the parties' intentions with regard to these payments. The order granting the counterclaim is accordingly affirmed.

Rental Payments Due Under the Contract

The referee found that LewRon's action in sending its telegram of May 29 to United, and in removing its equipment on June 2, constituted a termination of the rental agreement effective as of June 2. The telegram's statement that LewRon intended to deny United the use of its facilities "effective immediately," and the subsequent removal of those facilities, certainly afforded a reasonable basis for the conclusion that the termination was by LewRon, rather than by Overmyer's belated message of June 2. United was, thus, under no obligation to pay rent after the equipment was removed, and the determination that only two weeks' rent is owed by United must be affirmed.

The Miscellaneous Charges

In order to substantiate its claim for miscellaneous expenses incurred and services rendered pursuant to the contract, LewRon submitted several invoices which had been presented to United between the dates of May 4 and June 5. In contravention of this claim United submitted several cancelled checks made payable to LewRon and variout other parties, asserting that these constituted full payment of the invoiced charges. The referee held that LewRon had not presented sufficient evidence that payments had not been made on these charges. We think that conclusion is erroneous.

The checks submitted by United were never connected with the specific charges for which they purportedly constituted payment. Indeed, it is doubtful that such connections could have been made since all but two of the checks were dated prior to the earliest invoice. Of those two checks, one, in the amount of $2,757.28, was dated May 5, while the other, in the amount of $18,227.83, was dated May 11. The record reveals that $17,000 of the latter check was in payment of the weekly rental. It appears, therefore, that of the amounts reflected by United's checks only $3,985.11 could possibly have been in payment of the charges shown on the invoices, and even that amount has not been connected as payment for any specific charges. We think that LewRon has substantiated a claim of $13,326.89 for miscellaneous expenses incurred and services rendered and that, notwithstanding ample opportunity, no clear proof of payment for any of these charges was presented. LewRon's approved claim should be increased in the amount of $13,326.89.

We agree, however, with the referee's ruling that United incurred labor charges in the amount of $406.66 in con-

nection with a changeover in the cameras furnished by LewRon and that this expense was chargeable to LewRon under terms of the contract. This amount was properly included as an offset against LewRon's approved claim.

The order is accordingly modified to include miscellaneous charges in the sum of $13,326.89, and as so modified affirmed.